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No. 95-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY,

Petitioner,

v.

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BUSINESS COUNCIL OF ALABAMA IN SUPPORT OF PETITIONER

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MOTION OF THE BUSINESS COUNCIL OF ALABAMA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of this Court, *amicus*, the Business Council of Alabama, hereby moves for leave to file the attached brief *amicus curiae*. Petitioner has granted but respondents have refused to grant consent for the Business Council to file a brief *amicus curiae* in this case.

The Business Council is an association of over 4,000 Alabama businesses with a unique concern about the legal

environment in Alabama. The Business Council has long been active in the fight against arbitrary and unfair punitive damage awards, and has filed briefs *amicus curiae* in other punitive damage cases before this Court. The attached brief supports a grant of certiorari on the first question presented by the petition. Amicus seeks to bring to the Court's attention some considerations relevant to this question that have not been fully developed by the parties, most notably the pernicious effects of the Alabama Supreme Court's decision in this case.

Amicus therefore respectfully requests leave to file the attached brief *amicus curiae*.

December 15, 1995

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE BUSINESS COUNCIL OF ALABAMA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Business Council of Alabama is a non-profit association of over 4,000 businesses of all sizes and types including, for example, grocers, dry cleaners, restaurants, hardware stores, utilities, manufacturers, and insurers. Its members conduct business throughout Alabama and

therefore are concerned about the threat of arbitrary and unfair punitive damage awards.

The Business Council files this brief in support of petitioner because the decision of the Alabama Supreme Court sanctions punishment for conduct not previously considered unlawful in the State of Alabama. If left intact, this decision will create uncertainty and disruption for those doing business in the State and also will create a material disincentive for those contemplating doing business in Alabama. This harm is compounded because the decision appears to condone and even encourage differential and discriminatory treatment based upon considerations of race.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari in this case to resolve finally that a state may not constitutionally punish a defendant without clear prior notice that the conduct at issue is against public policy and subject to punishment. The Alabama Supreme Court upheld an extraordinary award of punitive damages against Ford for conduct that Ford had no notice would subject it to liability. The due process violation is particularly egregious because Ford was punished for *failing* to act in a manner that would plainly have been contrary to public policy. Ford acted in accordance with a program designed to stimulate business opportunities for minorities; it was punished for failing to *discourage* minorities from accepting such opportunities. The consequence of the Alabama Supreme Court's decision affirming this inexplicable punitive award will be to discourage voluntary minority

outreach efforts, while promoting discriminatory and paternalistic conduct.

ARGUMENT

I

FORD HAD NO NOTICE THAT IT COULD BE PUNISHED FOR FAILING TO ACT IN CONTRAVENTION OF PUBLIC POLICY

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). These basic considerations rise to the level of a due process requirement when a state attempts to impose punishment without fair notice. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). The Due Process Clause of the Fourteenth Amendment requires, at the very least, that a defendant have fair warning of the "egregiously tortious conduct" that will subject the defendant to punitive damages. *TXO Productions Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2724 (1993) (plurality).[1] Notice is

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[1] Without prior notice, liability is retroactive. This Court has indicated that it would not approve retroactive liability "on any theory of deterrence or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (citations omitted). *See also Landgraf*, 114 S. Ct. at 1505 ("Retroactive imposition of punitive damages would raise a serious constitutional question.").

especially important in punitive damage cases because state laws generally do not impose any limit on the size of the fine once a jury finds liability for punitive damages, creating "an acute danger of arbitrary deprivation of property." *Honda Motor Corp.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994).

Ford had no notice that its conduct might be considered "egregiously tortious" in Alabama. To the contrary, Ford sought to achieve a public good through its minority outreach program. Yet Ford was held liable for a $6 million penalty because it failed to provide respondents with statistical information that might be construed to suggest minority Ford dealers were less likely to succeed than other dealers. Ford's punishable offense was its failure to discourage minority applicants from accepting business opportunities with Ford. This is not egregious conduct worthy of punishment; it is precisely the opposite. Ford's refusal to inject race into its contract negotiations is consistent with well-established public policy.

Federal law establishes a strong policy against the use of race as a discouragement in contract offers. Federal civil rights law prohibits racial discrimination in the conditions of a contractual relationship, including offers to make a contract. 42 U.S.C. § 1981; *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989) ("Section 1981 "prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms"). Federal employment and housing law prohibits any advertisement or other invitation to contract that indicates any preference or discrimination on the basis of race. 42 U.S.C. § 2000e-3(b) (employment); 42 U.S.C. § 3604(c) (housing). *See*,

e.g., *Ragan v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905-07 (2d Cir. 1993) (exclusive use of white models in real estate ads violates the Fair Housing Act).

Yet Ford was punished for failing to present to an African-American businessman with whom it wished to contract race-specific data that Mr. Foster contends would have discouraged him from doing business with Ford. According to Mr. Foster, the data would have alerted him that his race made it likely that he would fail as a Ford dealer.[2] It is as if Ford were to be held liable for punitive damages because an advertisement seeking sales personnel *failed* to imply that minority applicants were less likely to earn commissions.

Ford plainly had no notice that its minority outreach efforts would result in punishment for failure to discourage minority participation. Indeed, Ford *did* have notice that it might have been exposed to liability under federal law if it had attempted to discourage minority participation. Respondents cite with approval the trial court's conclusion that there was sufficient evidence that "Ford defrauded the Plaintiffs by using sales and profit forecasts *and capitalization requirements* which were deceptive based upon facts known to Ford." Pet App. 28a (quoted in Opp. at 12) (emphasis added). In other words, Ford was assessed a fine because it established a capitalization requirement that did *not* take into account that Mr. Foster is African American. But if Ford had established such a plainly

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[2] Mr. Foster's contention is particularly irrational because his partner, who actually ran the business, is white.

discriminatory condition to its dealership agreement, it would have been exposed to liability under section 1981. *See, e.g., Cody v. Union Electric*, 518 F.2d 978, 979 (8th Cir. 1975) (complaint that black utility customers were required to pay a larger security deposit than white customers states a claim under section 1981); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 141 (N.D. Ill. 1977) (racially discriminatory pricing scheme in property insurance violates section 1981). *Cf. Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F. Supp. 893, 896-97 (N.D. Ohio 1977) (mortgage agent liable for punitive damages under Fair Housing Act for requiring larger down payment from buyer in neighborhood experiencing racial transition).

Ford cannot constitutionally be punished for failing to take action that would itself have exposed Ford to liability under federal law. "[I]f a citizen [is] constrained by two laws . . . and obedience to one would violate the other, to punish him for violation of either would deny him due process." *Korematsu v. United States*, 323 U.S. 214, 232 (1945) (Roberts, J., dissenting). *Accord United States v. Rivera*, 58 F.3d 600, 602 (11th Cir. 1995); *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 253 (1993).

II

THE ALABAMA SUPREME COURT'S DECISION WILL HAVE THE PERNICIOUS EFFECT OF LIMITING MINORITY BUSINESS OPPORTUNITIES AND ENCOURAGING PATERNALISTIC CONDUCT

The strong policy against racial intrusions in the contracting process derives from the fundamental principle

that market transactions, like other consequential decisions, should be driven by individual merit and not by group membership. *See, e.g., Patterson*, 491 U.S. at 188 ("The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination"). The Alabama Supreme Court affirmed a punishment against Ford because the company did *not* assume that the respondents were less likely to succeed merely because of race. That race-specific data were seen as material to the dealership transaction and relevant to potential success, and their omission sufficient to support $6 million in punishment, sends a signal that race is an impediment to success in business relations. Respondents' novel theory of liability, now accepted in Alabama, relies on establishing as a "fact" that some individuals are less likely to succeed merely because of their race. This Court cannot allow Ford to be punished for refusing to accept respondents' view of the world. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

The irony of this case is that companies like Ford have established minority outreach programs precisely because historic discrimination has precluded many members of minority groups from achieving success in various business ventures. The solution these outreach

efforts offer is to increase minority business opportunities. Like any other business transaction, there is no guarantee that these opportunities will lead to success. Nonetheless, the respondents sued Ford because they did not succeed. Their argument is that Ford should not have encouraged them to accept the opportunity. The result of Ford's punishment for this allegedly egregious conduct is that successful minority dealers continue to risk their capital and energy in running their businesses, while Mr. Foster, an unsuccessful dealer, can retire on his punitive damages windfall.

The specter of punitive damages in this context puts Ford, and countless other businesses, in an untenable position, for it is unassailable that the business opportunities these companies offer sometimes lead to failure. These failures may not be proportionate across racial groups. A variety of factors determine success. But if a company wishes to improve minority success by increasing minority opportunities, it will be punished in Alabama if it does not emphasize minority failures and thereby undermine the outreach program. An alternative for a company concerned about minority business opportunities might be to avoid liability by guaranteeing minority success. But such a scheme requires invasive programs premised on the notion that members of minority groups cannot make it on their own. This sort of "racial paternalism" has its own noxious consequences. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring). Ford should not be punished for its refusal to adopt one of these extraordinary measures.

CONCLUSION

Ford Motor Company was severely punished for conduct it could not have known was illegal, and was punished for its refusal to assume that members of minority groups are less competent than others to run a business. Plenary review will allow this Court to clarify the nature of the due process limitations on the imposition of liability for punitive damages and send an important signal about equal opportunity.

December 15, 1995

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